

HUMAN SERVICES BOARD

In re) Fair Hearing No. R-06/09-296
)
 Appeal of)

The petitioner appeals the decision by the Department of Disabilities, Aging and Independent Living (DAIL), Adult Protective Services Division substantiating a report that the petitioner physically and verbally abused her daughter, who is an adult with a developmental disability.¹ In support of its decision DAIL has submitted an Order of the Rutland Probate Court regarding the incident in question. The issue is whether the findings and conclusions of the Probate Court are binding on the Board as a matter of collateral estoppel.

The statutes regarding the substantiation of "abuse" against a vulnerable adult include the following provisions, at 33 V.S.A. § 6902:

¹ See Commissioner's Notice of Decision Regarding Allegations of Abuse, dated May 11, 2009.

(1) "Abuse" means:

. . .

(B) Any conduct committed with an intent or reckless disregard that such conduct is likely to cause unnecessary harm, unnecessary pain or unnecessary suffering to a vulnerable adult;

. . .

(E) Intentionally subjecting a vulnerable adult to behavior which should reasonably be expected to result in intimidation, fear, humiliation, degradation, agitation, disorientation, or other forms of emotional distress;

The vulnerable adult in this matter is the petitioner's twenty-two-year-old daughter, who was the subject of a Successor Guardianship proceeding filed in her behalf by DAIL following an incident in December 2008. At the time, the petitioner and her husband were their daughter's guardians. On April 8, 2009 the Probate Court issued an order that terminated the petitioner's and her husband's guardianship over their daughter, and which appointed DAIL as their daughter's Successor Guardian. The Court's order included the following findings of fact:

On December 11, 2008 . . . (daughter) began to walk into the house where her mother was standing on the porch. (Petitioner) struck (daughter) in the face; struck her in the chest three times and pulled her hair. (Petitioner) was also verbally abusive to (daughter) at that time.

In its Conclusions of Law the Court noted:

Apparently the abuse has gone both ways with (daughter) hitting her parents as well as (petitioner) hitting (daughter). This type of behavior is abhorrent and should never be tolerated.

There is no claim or indication in the record that the petitioner has appealed, or sought any other legal proceedings, to contest any of the findings or conclusions of the Probate Court following its Order of April 8, 2009. In opposing the Department's substantiation of abuse the petitioner does not specifically argue that the findings made by the Probate Court fall outside of the definition of "abuse" as that term is used in the above statute.

The Board has repeatedly and consistently adopted the doctrine of collateral estoppel in child abuse and neglect cases, and has relied on the test established in Trepanier v. Getting Organized, Inc. 155 Vt. 259 (1990), to determine whether it is precluded by findings in family court CHINS proceedings from making its own findings in the context of a subsequent substantiation appeal. The Board's policy in this regard was recently upheld by the Vermont Supreme Court in *In re P.J.*, 2009 VT 5 (August Term, 2008). There is no reason or policy that argues against the Board following the same procedures in adult protective services cases in which the

same alleged incident was the basis of a ruling by a probate court regarding guardianship.

The *Trepanier* criteria approved by the Supreme Court in these matters are as follows:

- (1) preclusion is asserted against one who was a party or in privity with a party in the earlier action;
- (2) the issue was resolved by a final judgment on the merits;
- (3) the issue is the same as the one raised in the later action;
- (4) there was a full and fair opportunity to litigate the issue in the earlier action; and
- (5) applying preclusion in the action is fair.

Id at 265.

In this matter the petitioner was a party in the earlier Probate Court proceedings, which she was given a full opportunity to participate in and contest, and which resulted in a final decision on the merits. The issue, whether sufficient facts were found that constitute the petitioner having abused her daughter, was clearly resolved by the Probate Court, which specifically found that the petitioner hit her daughter in the face and chest, and verbally abused her. Thus, there is nothing "unfair" about denying the petitioner the opportunity to relitigate the same set of facts in a substantiation appeal before the Board.

ORDER

Inasmuch as the Trepanier test (*supra*) is clearly met in regard to the facts and circumstances considered by the Probate Court, DAIL's decision substantiating the report of abuse in question is affirmed.

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